MOTION FILED

JAN 1 4 2000

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No. 99-1011

IN THE

Supreme Court of the United States

KNIGHT PUBLISHING COMPANY, d/b/a
THE CHARLOTTE OBSERVER,
and JOHN HECHINGER

Petitioners,

v.

PRESBYTERIAN HEALTH SERVICES CORP.

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of North Carolina

MOTION OF THE NEWS AND OBSERVER PUBLISHING COMPANY, INC. D/B/A *THE* (RALEIGH) *NEWS & OBSERVER* MEDIA GENERAL OPERATIONS, INC. AND THE NORTH CAROLINA PRESS ASSOCIATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF KNIGHT PUBLISHING COMPANY

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The News and Observer Publishing Company, Inc. d/b/a *The* (Raleigh) *News & Observer;* Media General Operations, Inc.; and the North Carolina Press Association respectfully move this Honorable Court for leave to file a brief *amicus curiae* in support of Knight Publishing Company's Petition for Writ of Certiorari. In support of this motion, the movants show unto the Court that:

The News and Observer Publishing Company publishes The Raleigh *News & Observer*, a daily newspaper of general circulation in Raleigh, North Carolina, and the surrounding areas.[1] *The News & Observer* participated as *amicus curiae* in the proceedings below. Media General Operations, Inc. publishes eight daily newspapers in North Carolina: the *Winston-Salem Journal*, a daily newspaper of general circulation in Winston-Salem and the surrounding areas; the *Independent Tribune*, in Concord and Kannapolis, the *Hickory Daily Record*; the *Statesville Record & Landmark*; *The News Herald* in Morganton; *The Reidsville Review*; *The Daily News* in Eden; and *The McDowell News* in Marion.[2] The North Carolina Press Association is a not-for-profit corporation and trade association whose members

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[1] The News and Observer Publishing Company, Inc. is owned by McClatchy Newspapers Incorporated, which owns six other North Carolina newspapers: the *Chapel Hill News*; the *Cary News*; the *Zebulon Record*; the *Wendell Clarion*; the *Knightdale Times*; and the *Smithfield Herald*.

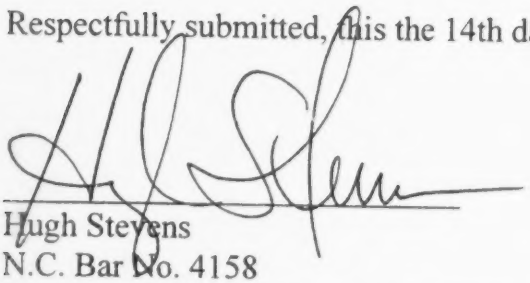
[2] Movant Media General is the same company that successfully petitioned this Court and established the public's right of access to criminal proceedings in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S. Ct. 284, 65 L. Ed.2d 973 (1980).

include 49 daily and 133 non-daily newspapers published throughout North Carolina. The association's members regularly attempt to cover the proceedings and activities of the state's courts; accordingly, the interpretation and application of First Amendment to the United States Constitution and Article I, §18 of the North Carolina Constitution are of great interest and importance to the Association and its member newspapers. The Association participated in this case as *amicus curiae* before the North Carolina Court of Appeals and the North Carolina Supreme Court.

Upon inquiry, Knight Publishing Company consented to Movants' filing a brief *amici curiae* and offered to consent, in reciprocity, to other parties' filings of a brief *amici curiae* in support of the Respondent. However, Presbyterian Health Services Corporation has refused to consent to Movants' participation as *amici*. Accordingly, Movants respectfully seek the Court's leave to file the accompanying brief *amici curiae* pursuant to Rule 37(2)(b) of the Supreme Court Rules. The Movants respectfully submit that they are uniquely qualified to explain the practical consequences of the North Carolina Supreme Court's paradoxical decision, which holds (1) that the press and public have a presumptive right, grounded in the North Carolina constitution, to attend and observe civil court proceedings, but (2) have no concomitant right to intervene or otherwise appear in civil trial court proceedings to protest actual or threatened closure orders.

In compliance with Rule 37(2)(b), the Movants' proposed brief is incorporated in this Motion.

Respectfully submitted, this the 14th day of January, 2000.



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INTEREST OF THE *AMICI*

The News and Observer Publishing Company, Inc. d/b/a *The News & Observer;* Media General Operations, Inc.; and the North Carolina Press Association respectfully submit this brief as *amici curiae*.[1] The News and Observer Publishing Company publishes *The News & Observer*, a daily newspaper of general circulation in Raleigh, North Carolina, and the surrounding areas. Media General Operations, Inc. publishes the *Winston-Salem Journal*, a daily newspaper of general circulation in Winston-Salem, North Carolina, and surrounding areas, and seven other daily newspapers in North Carolina. The North Carolina Press Association is a not-for-profit corporation and trade association whose members include 49 daily and 133 non-daily newspapers published throughout North Carolina. The Association's members regularly attempt to cover the proceedings and activities of the state's courts; accordingly, the interpretation and application of the First Amendment to the United States Constitution and Article I, §18 of the North Carolina Constitution are of great interest and importance to the Association and its member newspapers.. The NCPA has participated in this case as *amicus curiae* at the North Carolina Court of Appeals and Supreme Court levels.

SUMMARY OF ARGUMENT

This Court's rulings in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S. Ct. 284, 65 L. Ed.2d 973

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[1] Undersigned counsel authored this brief in full, and no party other than named *amici* have contributed monetarily to its preparation or submission.

(1980), Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), 102 S. Ct. 2613, 73 L. Ed. 2d 248, Press-Enterprise Co. v. Superior Court of Riverside County, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984), and Press-Enterprise Co. v. Superior Court of Riverside County, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed.2d 1 (1986), have firmly established the constitutional principle that judges may not close criminal trials and proceedings and exclude the public except for extraordinarily compelling reasons and in compliance with significant procedural safeguards. This Court has not, however, had the opportunity to address application of those same principles to context of civil proceedings.

This Court has written that "a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs.'" Mills v. Alabama, 384 U.S. 214, 218, 86 S. Ct. 1434, 1436, 16 L. Ed. 2d 484 (1966)). In contemporary society, few governmental activities affect more people more directly than civil trial courts. Although criminal cases -- especially "high profile" murder trials -- grab a disproportionate share of tabloid headlines, responsible news organizations also attempt to inform their audiences about toxic tort suits in which the defendants are alleged to have contaminated drinking water, litigation over whether tobacco settlement monies should be used to reimburse public health expenditures or to compensate displaced tobacco farmers, class actions alleging systematic racial discrimination by a national car rental company, challenges to congressional redistricting schemes, and constitutional decisions ordering refunds of hundreds of millions of dollars of state and local taxes -- just to mention a few of the subjects confronted recently by North Carolina civil courts. Given the

scope and importance of the issues that our civil courts are called upon to resolve, it is time -- indeed, *amici* respectfully submit that it is long past time -- for this Court unequivocally to extend the principles articulated in Richmond Newspapers and its progeny to civil court proceedings.

The decision of the North Carolina Supreme Court that *The Charlotte Observer* has petitioned this Court to review notes that this Court has not clearly stated whether the qualified right of access grounded in the U.S. Constitution extends to civil proceedings but holds that the North Carolina Constitution creates a parallel right of access to civil proceedings in this State. Having found that the right exists, however, the opinion simultaneously emasculates it by holding that a non-party has no right to appear and advocate for openness before a trial judge who has closed, or who may be about to close, a civil hearing. Such an anomalous holding clearly ignores this Court's admonition that "[t]he fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394, 34 S. Ct. 779, 783, 58 L. Ed. 1363 (1914). Compounding its errors, the state court further curtailed the putative right of access by holding that a trial court may avoid public scrutiny of its actions by permitting a party to hand up inadmissible exhibits and considering them *ex parte* without making them part of the court file.

A "right" so empty of meaning and practicality is illusory, and an opinion that renders a constitutional right so impotent is itself constitutionally untenable. Therefore, *amici* respectfully urge this Court to grant *certiorari* to review the decision of the North Carolina Supreme Court.

ARGUMENT

In the series of opinions beginning with Richmond Newspapers, this Court held that the First Amendment implicitly creates a presumptive right of the public and the press to attend and observe the proceedings in criminal cases, including trials, pre-trial hearings, and jury selection. These opinions also hold that because of this presumptive constitutional right of public access, a criminal proceeding may be closed only if the presiding judge, after a hearing, enters specific written findings demonstrating (1) that closure is absolutely necessary to protect a "compelling" governmental interest; (2) that no less restrictive measure will suffice; and (3) that the closure is "narrowly tailored" so that its scope and duration are as limited as possible. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed.2d 973 (1980); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed.2d 248 (1982); Press-Enterprise Co. v. Superior Court of Riverside County, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed.2d 629 (1984); and Press-Enterprise Co. v. Superior Court of Riverside County, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed.2d 1 (1986).

In light of the requirements (1) that the moving party adduce factual evidence justifying closure, (2) that the court make specific factual findings and embody them in writing, and (3) that any closure order be "narrowly tailored," it is clear that under the U.S. constitutional standard, the court must conduct a fact-finding hearing, and require the movant to justify closure, with respect to each individual proceeding for which closure is sought. "If the interest asserted is the right of the accused to a fair trial, the preliminary hearing

shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." Press Enterprise II, 478 U.S. at 14, 106 S. Ct. 2742.

The trial court in this case undertook no factual investigation, legal balancing or inquiry whatsoever before denying the public their right of access. Not only are the closure and sealing orders entered by the three trial judges below constitutionally defective in substance; they are also defective procedurally, because all three judges summarily abrogated the Petitioners' constitutional rights by refusing to hear them; indeed, any fair reading of the record reveals that the trial judges treated the Petitioners' requests with utter disdain and treated their attempt to assert their state and federal constitutional rights as an annoyance. None of the judges undertook any balancing test, made any factual findings or tailored the closure order narrowly to protect the legitimate interest of the petitioners. They not only declined Petitioners' request to open the courtroom and unseal the records; they slammed the door in their faces and treated them as interlopers. By proceeding in this fashion the trial judges flagrantly and arrogantly violated petitioners' rights under the North Carolina and United States constitutions.

The North Carolina Supreme Court assumed for purposes of this case that this Court "would hold that the qualified First Amendment right of public access applies to civil cases," and the court recognized that the open courts provision of Article I, Section 18 of the North Carolina

Constitution guarantees a qualified constitutional right on the part of the public to attend civil court proceedings. However, in silencing the voice of any party wishing to exercise those rights, the North Carolina court effectively has denied them.

Though access rights are enjoyed by the public at large, it has long been recognized that the media often serve as the eyes and ears of the public in reporting judicial proceedings. As this Court has held:

> Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public.

Richmond Newspapers, Inc., v. of Virginia, 448 U.S. 555, 572, 573, 100 S. Ct. 2814, 2825, 65 L. Ed.2d 973 (1980). There can be no question that the media stand in the shoes of the public and that it is primarily through their efforts that the public has access to observe the judicial process. It is vital, therefore, that the media and the public have a mechanism for voicing, asserting and exercising their and the public's right of access. The North Carolina Supreme Court's decision holds that a citizen of North Carolina is not entitled to intervene in a civil proceeding to assert the very right of access that the Court has found to exist. This holding is in error, because it misapprehends and misapplies Rule 24(a) of the Rules of Civil Procedure but more importantly because it denies fundamental due process by depriving citizens of any practical procedure for asserting their right of access and

preventing its abuse or infringement by a trial court.

As this Court has held in the context of civil rights and voting rights, a state may not erect procedural obstacles to stop the exercise of constitutionally protected freedoms. In State of South Carolina, v. Katzenbach, 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed.2d 769 (1966), this Court upheld the Voting Rights Act elimination of states' literacy tests and other procedural predicates to registration to vote.

"When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." Gomillion v. Lightfoot, 364 U.S. 339, 347, 81 S. Ct. 125, 130, 5 L. Ed. 110 (1960). When North Carolina's interpretation of state rules of civil procedure infringes on the public's exercise of its rights of access to view and review judicial proceedings, that becomes a federal issue that should be addressed and rectified by this Court.

In denying Petitioner the right to intervene, the North Carolina Supreme Court alludes to alternate processes by which the Court suggests Petitioner might challenge a trial court's closure. However, even if those means are available under North Carolina's Rules of Civil Procedure, each nonetheless would deprive the public of meaningful, *contemporaneous* access to judicial proceedings. Courts consistently have held that contemporaneous access is vital to the right of access. The Third Circuit has recognized the inimitable value of first-hand access to judicial proceedings:

> [T]he United States' contention that the district court's release of the transcript was adequate to cure any unjustified restrictions on the right of access . . relies on the Supreme Court's statement that in some instances "the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time...." Press-Enterprise I . .
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> * * *
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> [B]ut, as the Fourth Circuit has observed, this argument "unduly minimizes, if it does not entirely overlook, the value of 'openness' itself, a value which is threatened whenever immediate access to ongoing proceedings is denied, whatever provision is made for public disclosure." In re Charlotte Observer, 882 F.2d 850, 856 (4th Cir.1989). Furthermore, a transcript is not the equivalent of presence at a proceeding; it does not reflect the numerous verbal and non-verbal cues that aid in the interpretation of meaning. Thus closure will in many cases effectively prevent the public from receiving information that contributes to the news value of a proceeding.

United States v. Simone, 14 F.3d 833, 842 (3d Cir. 1994) (citations omitted). Likewise, the Second Circuit has cited the "significant public interest in affording that opportunity contemporaneously," National Broadcasting Company, Inc. v. Myers, 635 F.2d 945, 952 (2d Cir. 1980):

> Though the transcripts of the videotapes have already provided the public with an opportunity to know what words were spoken, there remains a legitimate and important interest in affording members of the public their own opportunity to see and hear evidence . . .

Id. (citations omitted). Or as the Third Circuit wrote in the "Crazy Eddy" case:

> We emphasize, however, that documentary access is not a substitute for concurrent access, and vice versa. The right of access encompasses both forms, and both are vitally important. . . . [A] transcript would not fully implement the right of access because some information, concerning demeanor, non-verbal responses, and the like, is necessarily lost in the translation of a live proceeding to a cold transcript.

United States v. Antar, 38 F.3d 1348, 1360 (3d Cir. 1994).

In a host of North Carolina cases, the media's ability to intervene has proven critical, not only because the rights asserted were grounded in the state and federal constitutions, but also because intervention permitted the news organizations to timely raise these issues in the trial courts whose actions or potential actions infringed or threatened to infringe their and the public's rights of access. State v. Kelly, 91 CRS 4250-4363 (Superior Court of Pitt County), 19 Media L. Rep. (BNA) 1285, State v. Demery, 93 CRS 15288-90

(Superior Court of Robeson County), 22 Media L. Rep. (BNA) 2383, In re the Subpoena of Laura Hart McKinny from the State of California, (Superior Court of Forsyth County, 1995), State v. Underwood, 95 CRS 4689 (Superior Court of Watauga County), Carter, et al. v. Woodard, et al., 98 CRS 1120 (Superior Court of Wilson County), "Publius Heterodoxus" v. Town of Chapel Hill, 96 CVS 1433 (Superior Court of Orange County), State v. Williamson, 95 CRS 865, 866 and 3738-50 (Superior Court of Orange County), Pugh, et al. v. Avis Rent A Car System, et al., No. 7:96-CV-91-F(2) (United States District Court for the Eastern District of North Carolina), Wilson v. State of North Carolina, No. 5:94-CV-8788BR3 (United States District Court for the Eastern District of North Carolina). In each of these cases the media's intervention led to a prompt hearing and immediate resolution of the access issues, and in none of them was it necessary for any party to burden the appellate courts with these issues.

Without the means of directly and immediately objecting to closure of a judicial proceeding or sealing of judicial records *as it is occurring*, the public will not be afforded true access and will -- at best -- be relegated to a cold, after-the-fact record of what transpired.

The Court further erred in this case by holding that news organizations or other citizens who move to intervene for the purpose of asserting their state and federal constitutional rights of access do not assert "a direct or substantial interest" sufficient to invoke Rule 24(a). When a trial judge has closed, or is threatening to close, a courtroom or a court record, the public's access rights are directly and immediately implicated; moreover, because those rights arise

under the state and federal constitutions, they are manifestly "substantial." Practically speaking, if news organizations or other citizens cannot intervene to protect these constitutional rights, they frequently will have no protection at all at the trial level; indeed, they are likely to be disregarded altogether.

The many decisions of the circuit courts are correct in holding that any documents and evidence tendered to a trial court for its use in determining the substantive issues before it, whether filed or not, become the public records of that court. The North Carolina Supreme Court's decision that one party to litigation can exclude evidence from the other party in the action, and from the public, while at the same time presenting it to the trial court as evidence on the substantive issues to be determined by the trial court is in error. Contrary to the Court's decision, N.C.G.S. 1A-1, Rule 5(e)(1) does not condone or provide for such a practice. The Court's decision that N.C.G.S. § 131E-95 makes peer review information inadmissible in all civil cases is doubtful at best, having so held, however, it was error for the North Carolina Supreme Court to then conclude that the hospital could, nonetheless, tender this inadmissible information to the trial court for its *ex parte* consideration determining the substantive issues of the case, to the exclusion of the plaintiff, the public and the court record.

CONCLUSION

Amici respectfully submit that in addition to vacating the patently unconstitutional orders issued by the trial court judges, this Court should remand this case to the trial court with a stern admonition to trial judges that motions to intervene and petitions for relief predicated on the First

Amendment to the United States Constitution and on Article I, Section 18 of the Constitution of North Carolina may never be shrugged off as irritants or nuisances.

Respectfully submitted, this the 14th day of January, 2000.

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